Case No. 19-55376

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, et al.,
Plaintiffs-Appellees,

v.

XAVIER BECERRA,
Attorney General of the State of California,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California
(No. 17-cv-1017-BEN-JLB)

BRIEF OF AMICUS CURIAE MAREK A. SUCHENEK, PH.D. IN SUPPORT OF PLAINTIFFS-APPELLEES

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March 31, 2021

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Date: March 31, 2021

s/ *Marek Suchenek, Ph.D.*
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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae is a citizen of the United States who resides in California and is a subject to California laws. He is not a member of any prohibited class or category of persons in the sense of California and federal laws that regulate acquisition, possession, and use of firearms. Amicus is interested in preservation of the Second Amendment, and he considers these rights essential for the well-being of society and—therefore—for the well-being of Amicus. He is concerned that California's ban on acquisition and possession of magazines capable of holding more than 10 rounds infringes on these rights. Amicus examined the State of California's arguments in favor of the ban in this case and, as a logician, found many of them logically invalid. Therefore, Amicus Curiae is filing this brief in support of Appellees.

Amicus Curiae holds a Master of Science degree in Mathematical Engineering and a Ph.D. in Technical Sciences, with focus on computational logic. He is a Professor Emeritus of Computer Science. Areas of his professional expertise include formal logic, mathematical logic, and non-monotonic logic. He has been listed on UCLA Logic Center at http://www.logic.ucla.edu/logicians.html as one of the "Nearby Logicians." He has an extensive record of publications of his multi-decadal research in

[1] All parties have consented to the filing of this brief. Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, the Amicus hereby certifies that no party's counsel or other person authored the brief in whole or in part or contributed money intended to fund preparing or submitting the brief.

said areas, several of which appeared in internationally renowned professional peer-reviewed journals. The list of his publications can be found at http://csc.csudh.edu/suchenek/curriculum-vitae.html#T_DISS. He assures the Court that the arguments that he presents in this Brief are, to his best knowledge, valid and within areas of his expertise.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Xavier Becerra, in his official capacity as Attorney General of the State of California ("the State"), as well as amici curiae who have filed briefs in support of the State, presented several arguments in support of the State's claims that its magazine ban withstands constitutional scrutiny. Amicus has found that, to his best and professional expertise, several of those arguments are logically invalid.[2] Therefore, Amicus respectfully advises the Court to not consider said invalid arguments. Otherwise, the Court will run a significant risk of arriving at false conclusions.[3]

Amicus thus presents the following six main points for the Court's consideration:

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[2] Amicus has found that the State's briefs constitute mixtures of valid and invalid arguments that are inter-related and cross-referenced to the point that it appears difficult, if not impossible, to separate the valid ones from the invalid ones. Therefore, in Amicus's opinion, it is rational to presume the logical invalidity of the State's objections against the Complaint for Declaratory and Injunctive Relief in this case.

[3] In what follows, "LCM" will be used as an abbreviation for *large capacity magazine*, and "LCMs" will be used as the plural of LCM. Also, for brevity, the classifier "the State et al." will refer to the State and to amici who filed briefs in support of the State.

1. Cumulative arguments presented by the State et al. are monotonic, in that if they apply to LCMs defined as magazines having capacity of 10+ rounds then they apply furthermore, *mutatis mutandis*, to any superset[4] of LCMs, for instance, to a class of magazines having capacity of 6+ rounds, with some of these cumulative arguments applying even to magazines having capacity of 0+ rounds.[5] If these arguments were capable of deriving a conclusion that LCMs can be banned under the Second Amendment then they would also be capable of deriving a conclusion, inconsistent with the current interpretation of the Second Amendment, that magazines of smaller sizes, for instance, having capacity of 6+ rounds, or even 0+ rounds, can be banned. Therefore, for the logical reasons that Amicus will demonstrate, these cumulative arguments are logically invalid and should be ignored.

2. Moreover, the cumulative arguments presented by the State et al. that attempt to conclude social undesirability of private possession of LCMs from the number of casualties resulting from unlawful use of LCMs is potentially harmful because if these arguments are considered valid then the cumulative reasoning that they are based upon may be applied to the *presumption of innocence* in order to conclude that the *presumption of innocence* must be abolished based on the number of individuals killed or

[4] Any class of magazines that includes all LCMs.
[5] That is, to single-shot firearms.

wounded by perpetrators who benefited from it, despite its social desirability.

3. The 2.2 shots in self-defense argument that the State et al. have invoked is invalid as it ignores deterrence as a practical means of self-defense. Using the same argument, one could prove that intercontinental ballistic missile (ICBM) are not needed for a national defense purpose because they were never used to defend an invaded nation. Therefore, for the logical reasons that Amicus will demonstrate, the "2.2 shots in self-defense argument" argument is logically invalid and should be ignored.

4. From the fact that a class A of firearms is or may by useful (even if mostly so) for military purpose or purposes it does not logically follow that the class A is not useful or needed for self-defense purposes. Otherwise, one could derive an absurd conclusion that single-shot firearms and revolvers are not useful or needed for self-defense purposes because they were useful (and at times mostly so) for military purpose in the past. Therefore, for the logical reasons that Amicus will demonstrate, the "military purpose" arguments for banning LCMs are logically invalid and should be ignored.

5. From the fact that LCMs were often, or even almost always, used in mass killings, the State derives a conclusion that banning LCMs will eliminate or greatly reduce the number of casualties during such atrocities. Such a derivation requires an assertion that LCMs are necessary (or mostly necessary) requisites for mass killings. However, that assertion is invalid as

there are numerous records of mass killings with thousands of victims in which firearms were either not used, or if they were used, they were prevailingly single-shot firearms or six-shot revolvers.

6. The State et al. often reason from their ignorance. Although there exist well-developed methodologies of reasoning from ignorance, the State et al. have not demonstrated that they employed any of those methodologies. Therefore, their arguments that incorporate such reasoning should be presumed invalid. That seems particularly appropriate because the State et al. appear not interested in serious research of actual and potential benefits of private possession of LCMs, and based on a lack of their findings in this respect, they arrive at the invalid conclusion that private possession of LCMs does not have benefits for purpose of self-defense that would be worth preserving.

ARGUMENT

Deciding truthfulness or falsehood of a claim or statement has been known to logicians as a matter of considerable difficulty that—in many cases—cannot be overcome. There must thus exist a large (infinite, as a matter of fact) collection of statements and claims the veracity of which cannot be established. But in some situations, during a trial for instance, a truth-finder must base his/her conclusions only on statements and claims the truthfulness of which has been established. For that purpose, a suitable concept of proof is used: Sentences and claims that have been proven are true and can be used by the truth-finder as bases of his/her conclusions, and

sentences that have not been proven remain of unknown veracity[6] and cannot be used to make truthful conclusions.

The concept of validity is central to the definition of proof. A statement, claim, and assertion, or an axiom, p is *valid* if, and only if, p is true under each admissible interpretation of its components (symbols, terms, etc.).

Rules of inference allow us to derive prescribed conclusions from prescribed premises. A rule of inference is valid if, and only if, its every conclusion is valid as long as all its premises are valid. A rule of inference that is not valid is called a *fallacy*. In particular, a fallacy is capable of concluding a false conclusion from true premises; this is why fallacies are unacceptable in proofs.

Proofs are constructed of assertions (these are statements or claims that have been taken for granted; they restrict admissible interpretations of components of conclusions that are being proven), axioms (these are statements or claims that are known to be valid), and valid rules of inference.

In modern logic,[7] a claim p is provable if, and only if, p is valid. Therefore, a claim q that is not provable must be false under at least one admissible interpretation[8] of its components.

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[6] They may be true or false without no one knowing which of the two possibilities is actually the case.

[7] Known as the *first-order logic* in professional language.

[8] There is no way of always correctly knowing under which interpretation.

Arguments that are like proofs, except that they involve at least one invalid "axiom" or fallacy in their bodies, are deemed logically not binding as they leave a possibility of arriving at invalid conclusions that are false under at least one admissible interpretation of their components. Those are called *invalid arguments*.

A proof that is formal enough may be verified as such in a finite time by means of mechanical checks; such a task may be carried, for instance, by a software program called proof-checker. With informal proofs, no such automated methodology of proof-checking exists. Extreme precaution must thus be exercised while considering a candidate for an informal proof in order to minimize the chance that it is an invalid argument. Usually, a proof used in legal proceedings is an informal proof.

Below, five major criteria for detection of invalidity of rules of inferences and suspected proofs, referred to as arguments, are listed.

1. If an argument is capable of concluding an invalid statement, then it is invalid.

2. If an argument is capable of concluding an absurd statement, then it is invalid.

3. If an argument is capable of concluding a false statement, then it is invalid.

4. If an argument is capable of concluding a statement that contradicts its one or more premises or assertions, then it is invalid; in particular, if an argument is capable of defying or contradicting itself then it is invalid.

5. If an argument is capable of concluding a statement that contradicts existing law, then it is (presumed legally) invalid.

These criteria are not necessarily disjoint in that more than one of them may be used to establish invalidity of an argument in question.

Amicus emphasizes that even seemingly inconsequential or marginal reasons of invalidity (in the above-listed criteria) of an argument must not be dismissed, as each of them establishes invalidity beyond any doubt, regardless of their "significance" or "impact," whatever these words may mean. For otherwise, leaving even one invalid argument capable of concluding even seemingly insignificant or unimpactful invalid conclusion allows a skilled reasoner to formally derive from it any false statement[9] of his/her choice.

Also, any argument that is capable of producing any reason of invalidity (in the above-listed criteria) remains invalid regardless of whether the reasoner (here, the State et al.) actually used it in the context that produced said reason or not.[10] For instance, **any argument that is capable of concluding a statement that contradicts existing law remains invalid (or, at least, presumed legally invalid) and should not be considered even if the reasoner who used the argument stopped short of contradicting the existing law.**

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[9] It is widely reported that Bertrand Russel provided an early example of such derivation. He proved with all formality that if 2 + 2 = 3, then he was the Pope.

[10] An argument that *4th of July falls on Sunday* is invalid, even if the reasoner did not use it to demonstrate that July 4, 2022, will fall on Sunday (which it will not).

As Amicus will demonstrate, the State et al. incorporate numerous invalid arguments to support their claims. Applying these arguments, a skillful and diligent reasoner may derive the absurd conclusion, for instance, that magazines of virtually any capacity may be banned under the Second Amendment. Although the State claims that it does not intend to follow the "slippery slope" of incremental bans of this sort, from a purely logical standpoint, such arguments remain as invalid as they would if the incremental bans of magazines of smaller and smaller sizes would actually follow.

As it is discussed in Section V, *infra*, there is a conspicuous lack of serious consideration by the State et al. of the benefits for the society and individuals of private ownership of LCMs. As such, the State's analyses ignore the possibility that such benefits—which will be lost if the Court upholds the LCM ban—may outweigh the actual benefits of banning LCMs. The State's reasoning from its lack of knowledge of the benefits of private ownership of LCMs in support of the purported rationality of their ban is invalid as it incorporates a well-known fallacy: *argumentum at ignoratium*.

The mere fact that the State may assure the Court that it is not going use its invalid arguments in a way that would make it arrive at false conclusions of the sort outlined above has no significance for establishing truthfulness of its statements, because there is no general, correct, and

feasible way to decide which statements are true and which are false.[11] Therefore, Amicus respectfully suggests that the Court ignore the State's assurances that its invalid arguments do not lead to false conclusions.

Using similarly one-sided arguments that ignore benefits of the existing legal *status quo* while focusing on its hypothetical social detriments could justify abolition of the *presumption of innocence* doctrine that is presently considered one of the most fundamental doctrines in the American criminal justice system.

Amicus also cautions the Court against accepting the so-called *common-sense* arguments as valid. Although there does exist well-developed methodologies of incorporating common-sense reasoning which minimizes chances of arriving at false conclusions,[12] Amicus have not found any credible evidence that the State employed any such methodology. The State's "common-sense" arguments should thus be ignored.

Specific arguments that Amicus presents in this Brief are independent from each other in that validity of any of them does not depend on validity of another.

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[11] Even though in some *specific* (e.g., easy) cases, the truthfulness of a statement can be correctly established.

[12] For instance, Artificial Intelligence provides some methods of that sort.

I. THE PURELY CUMULATIVE ARGUMENTS ARE MONOTONIC AND, THEREFORE, INVALID

The State et al. provide an account of negative or harmful effects that lawful availability of LCM has on the society. Below are but a few typical examples of such arguments.

1. "In the past two years, LCMs were used in eight of the nine mass shootings with known magazine capacity." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 2:20-21, *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017) (No. 17-cv-1017).

2. "LCMs have also been used in a number of mass shootings in California." *Id.* at 2:20-21.

3. "In the last thirty years, in instances where the magazine capacity used by a killer could be determined, researchers found that 86 percent of them involved an LCM." *Id.* at 11:11-13.

4. "[T]he evidence shows that banning possession of LCMs has the greatest potential to 'prevent and limit shootings in the state over the long run.' " *Id.* at 18:6-7.

A more inclusive, but still non-exhaustive, list of state's monotonic arguments is including in Appendix A.

If any of the above statements is true for LCMs defined as having greater capacity than 10, then it is *even more true* for LCMs defined as having greater capacity than any number between zero and ten.[13] Therefore, these arguments are monotonic—in that if they are true for the class of LCM, then they are also true of a superset[14] of this class.

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[13] In particular, they are true for all magazines of size greater than 6, greater than 5, and greater than 0.

[14] Any class that contains all LCMs.

In particular, if any of these arguments were valid to conclude that magazines over 10 rounds may be banned, then they would be valid to ban magazines of capacity 6+ rounds, or even 0+ rounds. **And it has nothing to do with the so-called "slippery slope."**

For any given legal status quo (*before* the considered ban on LCMs) in which *A* is a class of available magazines that can be lawfully possessed by private individuals, it does not serve any prohibitive-legislative purpose to define LCM that contains magazines that are outside *A*, that is, are not legally available for private possession. The reason is simple: Magazines outside class *A* are not legally available for private possession; therefore, it serves no prohibitive-legislative purpose to ban them. Therefore, in said legal status quo, LCM is a class of magazines that is a subset[15] of class *A*.

Clearly, those perpetrators who are limited to using only magazines that are lawfully available for private possession are likely to use LCM, for the reasons mentioned by the State in this statement: "While LCMs accounted for only 21 percent of the civilian magazine stock in 1994 (the final year before the 10-year federal ban), they were used in somewhere between 31 to 41 percent of gun murders of police." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 11:14-16, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

[15] A subset of a class *A* does not contain elements that are not in *A*.

After the ban on LCM is passed, there is will be a new legal status quo in which the new class A_{new} of available magazines that can be lawfully possessed by private individuals is equal to $A \setminus \text{LCM}$.[16] One can define a new class LCM_{new} of large-capacity magazines in the new status quo as all magazines of class A_{new} that have maximal or near-maximal capacity.

Clearly, those perpetrators who are limited to using only magazines that are lawfully available for private possession are likely to use magazines of class LCM_{new}. Now, the State will be able to re-apply, *mutatis mutandis*, all arguments that were used to justify ban of LCM and conclude that a ban on LCM_{new} is needed and it does not infringe on the Second Amendment.

Each time the State re-applies, *mutatis mutandis*, all above-mentioned arguments, it bans some positive number of magazines. Since there is no rational or legal limit on how many times the State can repeat this process, and the number of magazines to ban is finite, after finitely many iterations, the State will end up banning all magazines of any capacity and concluding that it does not infringe on the Second Amendment. The latter is a clearly invalid, if not outright absurd, conclusion that contradicts the existing law that pertains magazine possession.

For these reasons, the argument is capable of deriving a conclusion that contradicts existing law. It is thus invalid and should not be considered. It is important to note here that whether the State will repeat the above steps

[16] All elements of A, except for all elements of LCM.

or not has no bearing on the invalidity of said argument. It remains invalid even if the State will actually stop after banning only LCMs as currently defined.

A. The "Anti-slippery-slope" Argument Is Invalid

The State's contention that "Slippery-Slope Concerns Cannot Invalidate Section 32310,"[17] in response to "the Court expressed a concern that Section 32310 may lead to a slippery slope of more onerous firearm restrictions, such as limiting individuals to 'one gun with one round of ammunition'"[18] is invalid.

What the State calls a "slippery slope" is the cumulative fallacy of the State's argument that allows it to re-use the present anti-LCM arguments against the legality of constitutional protection for magazines of smaller sizes. It thus establishes the invalidity of the State's argument, discussed in detail in Section I, regardless whether a ban on LCMs will lead to a "slippery slope" or not.

B. That the State Focuses on Banning Magazines With "Military" Features Does Not Make the State's Cumulative Argument Non-applicable to Firearms with Small Magazines or to Single-Shot Firearms

It turns out that a single-shot pistol was produced during the WWII for military purposes. *See* Apps. C and D, *infra*.

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[17] Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Summary Judgment or, Alternatively, Partial Summary Judgment at 24:3, *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019) (No. 17-cv-1017).

[18] *Id.* at 24:4-6.

II. THE STATE'S "2.2 AVERAGE SHOTS IN SELF-DEFENSE" ARGUMENT IS INVALID

In the trial court, the State made the following invalid assertions in support of its claims:

> Even accepting plaintiffs' assertions that LCMs are "commonly possessed," [citation omitted], they have adduced no cognizable evidence that LCMs are typically used for lawful purposes. Although plaintiffs claim that they need military firepower in their homes to defend themselves against possible attackers, there is no proof that magazines holding more rounds are necessary or commonly used for self-defense.

Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 3:6-10, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

> In fact, numerous studies have shown that law-abiding individuals do not fire ten or more rounds in their homes, in self-defense or for any other reason. An analysis of the NRA's own reports of firearm use in self-defense "demonstrated that in 50 percent of all cases, two or fewer shots were fired, and the average number of shots fired across the entire data sample was about two."

Id. at 14:3-7.

> There is no credible evidence that a civilian would need more than a ten-round magazine in his home in order to defend himself.

Id. at 14:13-14.

The above argument is logically invalid because it has a capacity of deriving an absurd conclusion. Here is an example of such derivation: The United States and several other nations possess ballistic missiles with nuclear warheads for defensive purposes. Those missiles are often credited for 75 years without world war. Yet the number of times that said missiles

were used is *zero*. Applying the State's argument to this situation, one may conclude that these missiles are useless for national defense, which conclusion is clearly absurd.

Moreover, the data that the State quotes in support of this invalid argument are incomplete, as they do not incorporate data regarding self-defensive use of firearms in which no shots were fired. There are estimates that such a number is of magnitude of one million per year, but those are just estimates. If the data were properly collected (which they are not because, arguably, in most of such cases neither the assailant nor the victim have any interest in reporting the incident to the respective authorities), they would likely lower the average number of shots fired in self-defense way below one, making all other incidents where shots were fired in self-defense "isolated cases." Applying the State's argument to such a situation would support the conclusion that only single-shot firearms are useful for self-defense, and that law-abiding individuals have no need for any magazines at all, let alone LCMs. Such a conclusion is utterly absurd, which observation proves that the State's argument is invalid. Therefore, the State's claim that law-abiding individuals have no need for magazines over 10 rounds remains an unproven claim and just speculation.

The State, concluded that LCMs are not protected because Appellants' lacked proof that they would "need" to use one in self-defense, all while expressly dismissing Duncan's specific evidence on point as nothing but "a few anecdotes." *Id.* at 15:5-9. The State's conclusion from its own lack of

information (a lack of proof, in this particular case) is an instance of invalid inference known as *argumentum ad ignoratiam* as Amicus will discuss in detail in Section V.

III. THE STATE'S "SUITABILITY FOR MILITARY USE" ARGUMENT IS INVALID

The State's argument, for instance, that "Section 32310 does not burden conduct protected by the Second Amendment for the additional reason that they are most suitable for military use and have no reasonable self-defense purpose" is invalid. Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Summary Judgment at 6:14-16, *Duncan*, 366 F. Supp. 3d 1131 (No. 17-cv-1017). One function of the military is national defense, so there is no rational basis to assert that military firearms are not useful for self-defense. For instance, the Colt Model 1911 cal .45 semi-automatic pistol was, for about 100 years, up until 1990s, a standard-issue military sidearm. It was also, and still is, a popular self-defense firearm among private law-abiding individuals. An example of a single-shot firearm that might be considered "most suitable for military use" under the State's argument is discussed Appendix C.

The above invalid conclusion appears to be a result of confusion in reasoning from disjunctive statements of the form:

A is a member of B or A is a member of C

from which a reasoner derives an invalid conclusion that:

A cannot be a member of both B and C.

Such a conclusion is invalid in classic (monotonic, that is) sense. In order to be valid in non-monotonic sense, the minimization of relation *is a member of* is necessary (but may still be insufficient). To the best of Amicus's knowledge, there is no rational reason to minimize relation of membership of a firearm in various classes of firearms, including a class of firearms that are suitable for self-defense and a class of firearms that are suitable for military purposes.

Regardless of the cause of the use by the State's argument mentioned above, it is an invalid argument. For instance, it is capable of deriving absurd conclusions that contradict present interpretation of the scope of the Second Amendment's protection.

If the argument were valid then it could be applied in any point of modern history. For instance, it would imply that firearms that were (mostly or not) suitable for military use during WWII, or WWI, or the Civil War, were unsuitable for self-defense purposes of private individuals. Such conclusion would render many popular classes of firearms, including single-shot firearms, revolvers, shotguns, and rifles unsuitable for self-defense purposes at the time they were widely used by the military. A firearm that was not suitable for self-defense in the past would still not be suitable for self-defense today, so virtually all firearms lawfully possessed by private individuals would be deemed unsuitable for self-defense and, therefore, not protected by the Second Amendment. Such a conclusion is clearly absurd and inconsistent with present interpretation of the Second Amendment.

It is also worth noting that firearms typically possessed by American people at the time the Second Amendment was ratified were virtually identical to the majority of firearms used by the military at that time. This makes the State's argument historically unjustified in addition to being logically invalid.[19]

Thus, the inference rule that allows one to conclude unsuitability for self-defense of any firearm that is useful, or mostly useful, for military purposes is invalid. And the Court should thus ignore all arguments that assert *a priori* that a firearm that is suitable, or even "mostly" suitable, for military use is not suitable for self-defense of private individuals.

What's more, it does not logically follow from the fact that many military personnel are issued firearms equipped with LCMs that LCMs are not useful for self-defense. The State claims, without sound logical basis, that "[t]he military-style features of LCMs make them particularly attractive to mass shooters and other criminals and pose heightened risks to innocent civilians and law enforcement." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 11:7-9, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

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[19] Modern military weapons that are significantly more dangerous than commonly possessed firearms by private individuals are, according to *District of Columbia v. Heller*, 554 U.S. 570 (2008), not protected by the Second Amendment. This fact invalidates possible concerns that any opposition to State's invalid argument - that summarily declares all firearms that are mostly suitable for military use as not protected by the Second Amendment - is or may be somehow detrimental to public safety.

The claim appears to be based on two invalid assertions. First, it asserts (without a proof) that LCMs, solely by virtue of having capacity of more than 10 rounds, have some unspecified "military-style features," despite the fact that, for instance, non-military law enforcement and private armed security agents commonly carry them for self-defense purposes. Second, it asserts (without a proof) that "mass shooters" are somehow attracted to these unspecified "military features" and not to the simple fact that LCMs have larger capacities than non-LCMs. It is worth noting here that the same argument may be used for any semi-automatic pistol with magazine capacity between six and 10 rounds when compared to a six-round revolver.

IV. THE STATE'S ARGUMENT THAT LCM BAN WILL ELIMINATE OR MEASURABLY REDUCE MASS SHOOTINGS IS INVALID

The State concludes that banning LCMs will have a significant impact on the number of casualties during mass shootings. The State employs the following rule of inference in order to derive this conclusion.

From an assertion that "[m]ilitary-style large-capacity ammunition magazines . . . significantly increase a shooter's ability to kill a lot of people in a short amount of time," the State tacitly infers the conclusion that banning LCMs will eliminate or measurably reduce the number of casualties during mass shootings. Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Summary Judgment at 18:8-9, *Duncan*, 366 F. Supp.

3d 1131 (No. 17-cv-1017). This inference is invalid because it has a capability of deriving false conclusions.

If the inference were valid, then in the absence of LCMs, mass killings should be non-existent or, at least, rare. This, sadly, is not the case. The Mongol invasion of Europe,[20] for instance, involved slaughtering of large populations of the invaded countries despite the total absence of firearms at that time. *See* App. C, *infra* (for relevant excerpts and data). Similarly, the Civil War abounded in mass killings despite the total absence of LCMs at that time. *Id.*

Amicus emphasizes here that even though the cases mentioned above took place in other parts of the world or in the past, and that similar scenarios appear unlikely in the United States, today, the very fact that the State's argument, when applied to those "distant" situations is capable of producing a false conclusion, establishes that the argument is invalid. Amicus respectfully suggests that the Court ignores all the State's conclusions derived with a use of this invalid argument, for otherwise the Court may risk accepting as true conclusions that are false.

[20] "One empire in particular exceeded any that had gone before, and crossed from Asia into Europe in an orgy of violence and destruction. The Mongols brought terror to Europe on a scale not seen again until the twentieth century." Brian Landers, *Empires Apart: A History of American and Russian Imperialism* 17 (2011).

V. INVALID ARGUMENTS BASED ON REASONING FROM IGNORANCE

One of the main areas of cognition that has incorporated non-monotonic logic as a basis of inferences is "common-sense logic," in particular, in situations when a reasoner is required or expected to reason form an absence of information.

Here is a classic example of such situation. Suppose an individual *A* concludes that he does not have a brother from the fact that he does not know that he has one. Although such a conclusion is invalid in the classic (monotonic, that is) logic sense, it is often accepted as a common-sense conclusion. The non-monotonic logic justification of *A*'s conclusion goes like this:

If I had a brother, then I would have known that I have one.

The above non-monotonic rule of inference allows *A* to infer his factual conclusion from a lack of information. Should *A* be provided with more information, for instance, that his parents did not mention to him that he actually has a brother, he will withdraw his conclusion. Hence, the non-monotonicity of the logic that A used to justify his conclusion.

A rule Inference from Absence of Information (*IAI*):

From the absence of knowledge that proposition P is true, infer negation of P

is an example of non-monotonic inference that is commonly used while resorting to "common-sense." While it is commonly used in legal reasoning,

it is not the case that its application to any absence of knowledge justifies use of *IAI*. The rule *IAI* is applicable only if:

1. The reasoner would know *P* is true if *P* were true, and
2. The reasoner has exercised due diligence to identify and analyze any relevant information that could verify[21] *P*.

The State et al. have used the *IAI* rule of inference, concluding that LCM possession does not offer significant advantages to those individuals in self-defense situations. *See* App. A, *infra* (for a non-exhaustive list of uses of said rule by the State et al.) Because the State et al. have not provided any credible evidence or proof that they meet the above-mentioned qualifications (1) and (2) for application of the *IAI* rule, their inferences based on such applications are instances of the *argumentum ad ignorantiam* fallacy and, therefore, are invalid. Amicus respectfully suggests that the Court ignore these arguments, or otherwise the Court would run a risk of arriving at false conclusion or conclusions.

For example, the fact that the State summarily dismissed evidence provided by Duncan (that supported the thesis that private possession of LCMs is advantageous in self-defense situations) as "anecdotes,"[22] suggests that the State was not interested in exercising due diligence to identify and

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[21] Establish truthfulness of *P*.

[22] *See, e.g.*, Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 15:7-9, *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017) (No. 17-cv-1017) ("Plaintiffs offer a few anecdotes in which persons apparently fired more than ten rounds in self-defense in their homes or supposedly would have been aided by the ability to do so.").

analyze any relevant information that could verify said thesis. The State's claim that "[t]hese isolated incidents do not establish that LCMs are commonly used for self-defense," *id.* at 15:9-11, confirms such supposition. It also indicates another instance of invalid inference in which the State characterizes said "incidents" as "isolated," despite that fact that the State does not hesitate to rely on other cases of "isolated" incidents (e.g., mass shooting in which the perpetrator used a 30-round magazine) to support its own thesis. The State's selective dismissiveness is **not** indicative of a reasoner who would know *P* is true if *P* were true,[23] and has exercised due diligence to identify and analyze any relevant information that could verify that LCMs are useful for law-abiding individuals in self-defense situations.

The above strongly suggests that the State has not exercised the necessary due diligence, making application of the rule *IAI* invalid as it does not meet the validity requirements (1) and (2) described above. The State's conclusion that private possession of LCMs does not provide significant benefits in self-defense situation is thus invalid and should be ignored.

CONCLUSION

The State exhibited a tendency, visible to Amicus, to emphasize and—at times—over-emphasize any harmful effect of private possession of

[23] Because participants of self-defense situations in which the assailants were persuaded to not attack due to possession by their prospective victim of a firearm with LCM have no incentive to report such an incident to authorities, it is likely that the State has no way of knowing that such an incident did actually happen.

LCMs, without exhibiting a comparable tendency to seriously consider various beneficial effects of private LCM possession on the ability of law-abiding individuals to successfully defend themselves against threats of death and bodily injury. This is not surprising to Amicus.

A general objective of the *State* (referred to as "Government's Important Interests" in various documents filed by the State) is to restrict private ownership of firearms, for the presumed benefit of public safety, and not to expand it; hence, noticeable one-sidedness of the *State*'s several arguments and their natural vulnerability to reasoning pitfalls. This apparent tendency in itself might have been the main reason the *State* incorporated a large number of invalid cumulative (monotonic, that is) arguments in support of its objective.

It has been observed by several logicians, philosophers, psychologists, and other scholars that a reasoner who is committed to a specific outcome of his/her intellectual inquiries is somewhat likely to commit a *moralistic fallacy* that is capable of producing invalid derivations of factual conclusions form values. For instance, "[p]rivate possession of LCMs is harmful to the society," one might assert, "therefore it should not be protected by the Second Amendment" (a value statement). "Therefore, private possession of LCMs is not protected by the Second Amendment" (a factual conclusion).

Regardless of presumed social desirability of its conclusion, the inference is invalid and likely to prompt the reasoner to resort to other invalid arguments in support of the conclusion, as well as other conclusions

desired by him/her. Amicus has found numerous instances of such invalid arguments in the reasoning offered by the State et al. Amicus respectfully asks the Court to ignore all those invalid arguments.

Dated: March 31, 2021

Respectfully submitted,

s/ Marek Suchenek, Ph.D.
Marek Suchenek, Ph.D.
Amicus Curiae in Pro Per

APPENDIX

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APPENDIX A
List of State's Claims That Are True for Any Set of Magazines of Capacity Greater Than Some Number Less Than 10

The following arguments will still apply if class LCM were defined as having capacity greater than *n*, for some *n* that is less than 10 (for instance, if LCMs were the magazines of capacity greater than 7).

1. "These large-capacity magazines (LCMs) are disproportionately used in crime, and feature prominently in some of the most serious crime, including homicides, mass shootings, and killings of law enforcement officers. " Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 1:4-7, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

2. "When LCMs are used to commit crime, more shots are fired, more victims are wounded, and there are more wounds per victim." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 1:7-8, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

3. "Because LCMs enable a shooter to fire repeatedly without pausing to reload, they significantly increase a shooter's ability to kill and injure large numbers of people quickly." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 2:9-11, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

4. "LCMs frequently have been used in mass shootings over the last three decades, including the deadliest shooting in this country's history in Orlando, Florida, where the gunman killed forty-nine and injured fifty-three people." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 2:11-14, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

5. "LCMs have also been used in other massacres, such as those taking the lives of 14 people and seriously injuring 22 more in San Bernardino, California, the murder of children and their teachers at Sandy Hook Elementary School in Newtown, Connecticut, and the shooting spree that killed six and wounded 13, among them former Congresswoman Gabrielle Giffords and the Honorable John Roll, in Tucson, Arizona." Attorney General's Opposition to Plaintiffs' Motion for Preliminary

Injunction at 2:14-19, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

6. "In the past two years, LCMs were used in eight of the nine mass shootings with known magazine capacity." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 2:20-21, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

7. "LCMs have also been used in a number of mass shootings in California." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 2:21, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

8. "LCMs have obvious utility in offensive assaults by allowing the shooter to fire more rounds without having to reload." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 10:21-23, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

9. "In the last thirty years, in instances where the magazine capacity used by a killer could be determined, researchers found that 86 percent of them involved an LCM." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 11:11-13, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

10. "When LCMs are used in crime, they result in more shots fired, more victims wounded, and more wounds per victim." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 11:18-19, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

11. "While LCMs may be useful and appropriate in a military context, they 'pose a distinct threat to safety in private settings as well as places of assembly.' " Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 12:5-7, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

12. "Plaintiffs do not meaningfully dispute the evidence that LCMs are unusually dangerous, but rather argue that some of the same attributes that make them so lethal and effective at killing and injuring vast numbers of people can also be useful in self-defense, and that LCMs are marketed for such lawful purposes. Motion 3-4. However, the fact that law-abiding citizens may "prefer" LCMs, for self-defense or any other purpose, does not cast doubt on their dangerousness. " Attorney General's

Opposition to Plaintiffs' Motion for Preliminary Injunction at 12:12-17, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

13. "Similarly, however LCMs may be advertised, the fact remains that they are overrepresented in the mass killings of innocent civilians and law enforcement." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 13:1-2, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

14. "In contrast to the data indicating that LCMs are used by criminals and increase casualties in mass shootings, there is no study or systematic data to support the argument that LCMs are necessary or commonly used in self-defense." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 15:13-16, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

15. "Accordingly, and because they are unusually dangerous, LCMs fall outside the scope of Second Amendment protection." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 15:18-19, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

16. "[T]he evidence shows that banning possession of LCMs has the greatest potential to 'prevent and limit shootings in the state over the long run.' " Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 18:6-7, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

17. "A reduction in the number of LCMs in circulation will reduce the number of crimes in which LCMS are used and reduce the lethality and devastation of gun crime when it does occur." Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction at 18:9-10, *Duncan*, 265 F. Supp. 3d 1106 (No. 17-cv-1017).

18. "LCMs are uniquely dangerous because they enable a shooter to fire more rounds in a given period of time, which results in more shots fired, more victims wounded, more wounds per victim, and more fatalities." Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Summary Judgment at 16:9-11, *Duncan*, 366 F. Supp. 3d 1131 (No. 17-cv-1017).

19. "LCMs were originally designed to afford soldiers in the battlefield an ample supply of ammunition for combat, enabling them to expend large numbers of rounds without pausing to

reload. *Kolbe*, 849 F.3d at 137; DX-12 at 540('[L]arge capacity magazines are indicative of military firearms.'); DX-13 at 557-58 (noting that detachable large-capacity magazines were 'originally designed and produced for . . . military assault rifles' and referring to them as 'large capacity military magazines'); PX-2 at 31 (discussing 'transition' of LCM-equipped firearms from 'military to civilian use for sport or self-defense'); DX-14 at 684 ('High capacity magazines are military designed devices.')." Defendants' Opposition to Plaintiffs' Motion for Summary Judgment or, Alternatively, Partial Summary Judgment at 2, *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019) (No. 17-cv-1017).

20. "Because they enable shooters to sustain fire without pausing to reload, LCMs are 'designed and most suitable for military and law enforcement applications.' *Kolbe*, 849 F.3d at 137. And in the wrong hands, LCMs enable criminals to fire more rounds in a given period of time, resulting in more victims wounded, more wounds per victim, and more fatalities. [. . .] In numerous public mass shootings, shooters have utilized LCMs to kill and injure their victims on a record scale. *See* DX-16 at 722-36; DX-17 at 740; DX-20 at 799-807; DX-18 at 779; DX-4 at 127-28. On October 1, 2017, in what was, as of the date of this brief, the deadliest shooting in United States history, a gunman used a variety of assault rifles and LCMs to fire over 1,000 rounds at concertgoers at an outdoor music festival in Las Vegas, Nevada, killing 58 people and injuring more than 500 others. [. . .] On June 12, 2016, in what was the deadliest mass shooting before the Las Vegas incident, a gunman used multiple 30-round LCMs to murder 49 people and injure 53 others at a night club in Orlando, Florida. DX-18at 778; Graham Decl. ¶19(l); DX-20at801; DX-21at 809-11. And on December 14, 2012, at Sandy Hook Elementary School in Newtown, Connecticut, a gunman used an AR-15-type rifle equipped with 30-round magazines to fire more than 144 rounds of ammunition, killing twenty children (all first-grade pupils) and six adults. DX-22 at 825-26; DX-20 at 802; DX-18 at 779." Defendants' Opposition to Plaintiffs' Motion for Summary Judgment at 3, *Duncan*, 366 F. Supp. 3d 1131 (No. 17-cv-1017).

21. "LCMs have also been used in a number of public mass shootings in California. Graham Decl. ¶19. For example, on December 2, 2015,two assailants used assault weapons and LCMs to shoot36 people during a holiday party in San Bernardino, killing 14 and seriously injuring 22 more. DX-

20at801; Graham Decl. ¶19(k). And on June 7, 2013, in Santa Monica, an assailant used a home-built AR-15 rifle equipped with LCMs to kill his father and brother and then kill three more people and injure at least three others. DX-17 at 745; Graham Decl. ¶19(j).” Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgment at 4, *Duncan*, 366 F. Supp. 3d 1131 (No. 17-cv-1017).

22. “The last ten years saw twice as many shooting incidents in which six or more people were killed than in the previous decade, and the use of LCMs in such massacres has increased substantially. DX-16 at 722-36; DX-3at 79-80. The fatality rate in mass shootings has also risen. DX-24 at 883 (finding that, from 1996 to 2015, high-fatality mass shootings involving at least six fatalities have reached “unprecedented levels in the past ten years”); *see also id.* at 877, 892. In fact, the presence of LCMs in high-fatality gun massacres is ‘the factor most associated with high death tolls in gun massacres.’ ” Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgment at 4, *Duncan*, 366 F. Supp. 3d 1131 (No. 17-cv-1017).

23. “California law defines a “large-capacity magazine” as any ammunition-feeding device with the capacity to accept more than ten rounds.” Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgment 6, *Duncan*, 366 F. Supp. 3d 1131 (No. 17-cv-1017). (COMMENT (Amici) No definition, however, of “mass shooting.”)

24. “Intermediate scrutiny requires that (1) the government’s stated objective must be “significant, substantial, or important,”and (2) there must be a “reasonable fit” between the challenged regulation and the asserted objective.” Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgment at 15, *Duncan*, 366 F. Supp. 3d 1131 (No. 17-cv-1017). (COMMENT (Amici) Monotonic argument is not a fit. Banning 11-round magazines to prevent shootings with 30 magazines is an example.)

APPENDIX B
Mass Killings Without LCMs

This section contains some commentary (from the internet) regarding mass killing without LCMs. It invalidates an argument that elimination of LCMs would by itself bring end to mass killings in the United States, today.

Mongol Invasion of Europe

"Historians regard the Mongol raids and invasions as some of the deadliest conflicts in human history up through that period. According to Brian Landers, 'One empire in particular exceeded any that had gone before, and crossed from Asia into Europe in an orgy of violence and destruction. The Mongols brought terror to Europe on a scale not seen again until the twentieth century.' Diana Lary contends that the Mongol invasions induced population displacement 'on a scale never seen before,' particularly in Central Asia and Eastern Europe. She adds, 'the impending arrival of the Mongol hordes spread terror and panic.' " *Mongol Invasions and Conquests*, Military Wiki, https://military.wikia.org/wiki/Mongol_invasions_and_conquests#cite_ref-Brian_Landers_2011_17_1-0 (last accessed Mar. 31, 2021).

American Civil War

During the United States Civil War, the Battle of Gettysburg mass shooting resulting in more than 57,000 people killed or wounded. "Union casualties were 23,055 (3,155 killed, 14,531 wounded, 5,369 captured or missing). Confederate casualties are more difficult to estimate. Many authors have referred to as many as 28,000 Confederate casualties, and Busey and Martin's more recent 2005 work, *Regimental Strengths and Losses at Gettysburg*, documents 23,231 (4,708 killed, 12,693 wounded, 5,830 captured or missing)." *Battle of Gettysburg*, Wikipedia, https://en.wikipedia.org/wiki/Battle_of_Gettysburg (last accessed Mar. 31, 2021).

The vast majority of those mass shootings involved single-shot firearms. (A most notable exception was 7-round Spencer Repeating Rifle/Carbine that was a relative rarity, and even more rare Henry rifle with 17-shot capacity. Also, cap-and-ball revolvers, such as .44-cal. Colt Model 1860, were used. "At first glance, dismounted horse soldiers, with their faster-firing shoulder arms backed up by six-shot handguns, might seem to have an advantage over infantrymen armed with single-shot muzzleloading rifle-muskets. In reality, however, Civil War cavalry did not engage in stand-up fights with infantry, as the mounted arm's tactical role was quite different than that of foot soldiers. In addition to not being schooled in infantry tactics, a dismounted cavalry force immediately lost a quarter of its

potential firepower, as every fourth man was required to hold horses behind the skirmish line. ") For example, the standard rifle of the Union Army of the Civil War was the 1861 Springfield Rifled Musket. The Confederates used a similar weapon, the Pattern 1853 Enfield Rifled Musket imported from Britain.

Made by the million and issued by the dozen. The service life of the FP-45 "Liberator"

Posted October 6, 2013 in Pistols by **Othais** with 33 Comments

Tags: history

Given the growing fascination with crude 3D printed firearms, it may be worth looking into the original "Liberator" pistol.

During WWII the Joint Psychological Warfare Committee sought a means to arm civilians in occupied territory, sowing panic and tying down more enemy troops. They were meant to be air dropped by the thousands. They would serve almost no purpose when captured by the occupiers but could be used for assassination, intimidation, and appropriation by guerrillas. They should be powerful enough to kill in a single shot, small enough to conceal readily, and enough should be provided to make them essentially disposable.

The resulting single shot, .45 caliber hand gun was made of steel pressings with a smooth bore barrel. It c
be reloaded but not quickly at all. The entire project was classified and so the new guerrilla gun was titled

"Flare-Projector 45". Manufacturing was geared to provide millions if necessary and used crude but sturdy welding and riveting for assembly. A contract was signed on May 15th, 1942 and by June 17th the 1,000,000 pieces were completed by the Guide Lamp plant. Each pistol was packaged with 10 rounds of ammunition and a pictoral instruction sheet using no written language so that anyone, anywhere, could use the firearm.

The original 1,000,000 pieces were to be shipped to British forces, but with the growing Sten production made the pistol less desireable and the order was halved. The other 500,000 pistols remained in the US. 50,000 were picked up by the Allied Intelligence Bureau and fell under MacArthur's authority. The remaining 450,000 were taken by the Office of Strategic Services. Not all would remain in the country.

So where did they go?

England
500,000 were shipped to England. If any of these were ever dropped or issued the records have not been found. What became of them is uncertain.

China
The O.S.S. turned over 100,000 pistols to the Sino-American Cooperative Organization which shipped them into India and later into Kunming. There are sources that quote seeing the pistols in Chinese hands, although some claim most found their way to bandits and brigands.

The Philippines
After China, this seems to be the largest concentration of issued FP-45s. MacArthur had taken several thousand into active service and we'll cover those later, but over 40,000 were stored in Australia. Some of these were carried over for Philippine guerilla use by Australian forces and earned the nickname "Kangaroo Guns" as the natives believed them to have been made down under. Most seem to have been put to use post war by peace keeping forces or given out as souvenirs.

Guadalcanal, Tulagi, New Caledonia
MacArthur took 8,000 pistols for these territories. His communications reveal he expected to distribute these to natives in order to help resist any Japanese activities. If these occured in each territory, and to what extent is unknown. From interviews it seems small numbers were dropped to friendly troops at odd intervals. Many were traded or given away and caused confusion due to the lack of any markings or language. They were often mistaken for crude Japanese pistols.

Greece
The O.S.S. dropped limited numbers of the FP-45 along with agents in Greece during the war. They may have also followed the O.S.S. into other field operations but these are not as clearly documented.

Australia
More of MacArthur's reserve in Australia were distributed by the little known Z-Force under the Australian Service Reconnaissance Department. They were taken as part of a mission to train and arm some 6,000 natives living on Japanese occupied islands north of Australia.

Other
The rough little gun also saw service with the U.S. Army Intelligence Service (G-2) which may account for [illegible] sightings in various parts of Europe. Exact usage is unknown but would have been in very small quantities.

To learn more about the origins of the pistol and its manufacture come on over to C&Rsenal.

Othais

Othais is practically useless with modern firearms. That's OK though, because he specializes in Curio and Relic military pieces and has agreed to decorate The Firearm Blog with a little history. He maintains his own site, C&Rsenal, with the help of his friends and the collector community.

Figure 1: Single shot, .45 caliber gun of war (WWII) for assassination, intimidation, and appropriation by guerrillas.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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**BRIEF OF AMICUS CURIAE MAREK A. SUCHENEK, PH.D.
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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